

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MICHAEL COX**

Claimant

VS.

**AMERICAN DISPOSAL SERVICES**

Respondent

AND

**AMERICAN HOME ASSURANCE**

Insurance Carrier

Docket Nos. 1,020,204  
1,021,901

**ORDER**

Respondent requests review of the November 4, 2005<sup>1</sup> and December 1, 2005<sup>2</sup> preliminary hearing Orders entered by Administrative Law Judge (ALJ) Thomas Klein. Pursuant to respondent's request, the Board consolidated these matters for purposes of appeal.

**ISSUES**

This appeal deals with two separate orders issued in two separate claims following a consolidated preliminary hearing that was held on September 7, 2005. In Docket 1,020,204 the ALJ granted claimant temporary partial disability benefits and designated Dr. Prostic to serve as the authorized treating physician.<sup>3</sup> On December 1, 2005, the ALJ issued another order, this time in Docket No. 1,021,901, ordering the same temporary partial disability benefits as contained within the earlier order. But in this second order he designed Dr. Stepp as the authorized treating physician. The record does not indicate why two separate orders were issued following a single hearing, nor why two different

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<sup>1</sup> Docket No. 1,020,204

<sup>2</sup> Docket No. 1,021,901

<sup>3</sup> This Order was issued November 4, 2005.

physicians were designated. Claimant's counsel suggests that the second order was issued in error but whether that is, in fact, the case is unclear.<sup>4</sup>

Respondent appealed both preliminary hearing Orders alleging the ALJ erred in making an implicit finding that a compensable accident or series of accidents occurred or that the injury arose out of and in the course of his employment.<sup>5</sup> Respondent also asserts the ALJ exceeded his jurisdiction by awarding temporary partial disability benefits. Respondent requests that in the event this claim is found to be compensable, that the Board either select from one of the two physicians identified in the ALJ's Order or remand this issue back to the ALJ for clarification.

The claimant asks that the Board affirm the ALJ's November 4, 2005 Order authorizing Dr. Prostic to be the treating physician and awarding claimant temporary partial disability compensation.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant's testimony, as to his accidents, is uncontroverted. Claimant was employed as a route driver, and on September 27, 2004, he was in the process of picking up large items such as sofas, chairs and ottomans and loading them into his trash truck. As he worked that day, he began developing low back pain with pain down into his right leg.<sup>6</sup> This was reported to his supervisor, Jim Melton, and he was told to go to his personal physician.<sup>7</sup>

Claimant went to see Jack Bell, a physician's assistant in Coffeyville, Kansas. Mr. Bell ordered an MRI and x-rays. The doctor referred the claimant to physical therapy and provided pain medication. He was given work restrictions that limited his lifting to no more than 20 pounds and no bending or stooping. These restrictions were given to Mr. Melton and claimant was provided with an accommodated job.

Claimant was assigned to the shop area, picking up trash and cleaning up trucks. Claimant did this job for 5-6 months at the same pay he was making before, but according to claimant, this job activity still seemed to aggravate his back. Claimant notified his supervisor of this aggravation, but his modified duty was not changed.

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<sup>4</sup> Claimant's Brief (filed Jan. 16, 2005).

<sup>5</sup> Application for Review (filed Nov. 21, 2005).

<sup>6</sup> This accident forms the basis for Docket No. 1,020,204.

<sup>7</sup> Notice is not contested.

Claimant's second injury occurred on February 14, 2005 while on modified duty. Claimant was power washing a D6 dozer and the unit on the back of an oil truck.<sup>8</sup> Claimant stated that the ground was wet and muddy and when he was washing he just slipped and fell. As a result of this fall, the claimant jarred his back. Within 5 minutes of falling, claimant stated that he notified Debbie O'Connell, the office manager, and was sent to Mark Hoffmeister, a physician assistant at Cherryvale Clinic. This clinic is apparently where respondent's workers are routinely sent when suffering from work-related injuries.

Claimant's back and leg pain consequently got worse due to the February 14, 2005 fall. Mr. Hoffmeister, the physician assistant, gave claimant some medication, told him to continue with his current medications and to come back in a week and a half. Claimant was then referred back to physician assistant, Jack Bell, who continued claimant on the medication that had been previously prescribed. Mr. Bell ultimately referred claimant to Dr. Fielding, a neurosurgeon in Tulsa, Oklahoma. Dr. Fielding apparently indicated claimant was not a surgical candidate.

At the request of his attorney claimant was seen by Dr. Edward J. Prostic on March 18, 2005. Dr. Prostic recommended claimant have epidural steroid injections along with medications and exercise. Dr. Prostic also felt that the claimant should continue with his restricted duties.

Claimant was also seen by Dr. Timothy E. Stepp on June 8, 2005. This examination was, in Dr. Stepp's view, only an independent medical evaluation, although claimant's counsel indicates respondent had approved Dr. Stepp to not only evaluate claimant's injuries but to treat him as well. For whatever reason, Dr. Stepp did not understand his role. He issued a written report, indicating claimant needed a supervised weight reduction program, a smoking cessation program and instructed claimant to use proper body mechanics in his activities. He declined to offer any treatment and specifically recommended against surgery or the epidural injections Dr. Prostic had suggested. However, Dr. Stepp did not have the records from Dr. Fielding, nor did he review the lumbar myelogram Dr. Fielding had performed.

Around June 20, 2005, claimant was taken off of his accommodated job as a swing man and was given an office job as a scale clerk running the scales. This office job paid \$9.36 an hour, 40 hours a week. The pay for this job represents a significant pay cut from claimant's pre-injury \$14.28 per hour wages.

At the preliminary hearing in these claims, there was no testimony to contradict claimant's recitation of the events surrounding his accident. In both instances, he attributed his low back and leg complaints to work activities. None of the doctors dispute that mechanism of injury. Thus, respondent's suggestion that claimant failed to establish that his injuries arose out of and in the course of his employment fails. While it is true that

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<sup>8</sup> This accident forms the basis for Docket No. 1,021,901

the ALJ failed to make an explicit finding to that effect, it is implicit in his Order(s) that he came to such a conclusion. This is particularly true given the fact that respondent provided no evidence to suggest otherwise. Thus, the Board affirms the ALJ's finding that claimant sustained two separate work-related injuries.

As for the contention that the ALJ exceeded his authority in awarding temporary partial disability benefits, the Board disagrees. As noted by the respondent in its brief, the Board has concluded on numerous occasions, at a preliminary hearing, that the ALJ has authority to award temporary partial disability benefits at a preliminary hearing.<sup>9</sup> In spite of counsel's rather lengthy dissertation on this issue, the Board is not inclined to hold otherwise. The ALJ's decision to award of temporary partial disability benefits did not exceed his authority under the Act.

Finally, as for the existence of two orders, directing two different physicians to treat the same area of the body, the Board is at a loss to explain this. No one disputes the area of claimant's body that is currently in need of treatment, but for whatever reason, the ALJ issued two orders directing two physicians to treat the same condition(s). This can only be the result of an oversight. However, the Board has no jurisdiction to consider this matter. K.S.A. 44-534a (a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. The designation of a physician, even two physicians for the same complaint(s) is not an issue this Board is authorized to consider. Thus, the Board will dismiss that portion of the appeal.

**WHEREFORE**, it is the finding, decision and order of the Board that the Orders of Administrative Law Judge Thomas Klein dated November 4, 2005 and December 1, 2005, are affirmed in part and dismissed in part.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2006.

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
John B. Rathmel, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>9</sup> See *Brown v. Lawrence-Douglas County Board of Health*, No. 205,848, 1996 WL 167237 (Kan. WCAB Mar. 29, 1996).